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Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Re: *CC Docket No. 92-297, et al. – Cook Inlet Proposal to Eliminate
Installment Payments*

Dear Ms. Allen:

We are writing in response to questions to WebCel Communications, Inc. ("WebCel") regarding its views on the proposal by Cook Inlet Region, Inc. ("Cook Inlet") to eliminate installment payments from the LMDS designated entity program.¹ These questions were posed by you, Kathleen O'Brian Ham, and Sande Taxali, as well as by Commissioner Ness, during recent *ex parte* meetings in connection with WebCel's petition for partial reconsideration of the LMDS *Second Report and Order*. This letter is also offered in light of televised remarks by Chairman Hundt last week forecasting the demise of installment payments as a designated entity preference for LMDS.

WebCel understands that this proposal stems from frustration at current attempts by certain PCS C Block auction winners to lobby the Commission to either forgive or restructure their debt obligations to the Government, and recognizes that the Commission may be becoming increasingly wary of future financing difficulties. *However, the complete elimination of installment payments for LMDS designated entities would be contrary to Congressional intent, well-established Commission policy to promote small business, and settled standards for agency policymaking, and must therefore be rejected.*

¹ See Petition for Reconsideration of Cook Inlet in CC Docket No. 92-297 at 5-6. During these meetings, we were also asked to provide additional support regarding WebCel's assertions as to the capital outlay required for the introduction of LMDS service, and, in particular, why LMDS is well-suited for small, start-up ventures. We have provided this information as part of WebCel's Reply, filed July 14, to Oppositions to its Petition for Reconsideration in CC Docket No. 92-297.

- ***The installment payment program for designated entities has been largely successful and is perhaps the Commission's key tool for promoting small business participation in spectrum-based services.***

In designing a system for competitive bidding, the Commission is required to "promot[e] economic opportunity and competition . . . by disseminating licenses among a wide variety of applicants, including small businesses" and to ensure that "small businesses . . . are given the opportunity to participate in the provision of spectrum-based services."² As the Commission has repeatedly found, *access* to capital, rather than just the *cost* of capital, is the most significant hurdle to entry by small businesses. The Commission has thus indicated that removing that barrier to entry for small businesses has been its "top priority" for spectrum policy.³

In order to promote the participation of small business and similar groups in spectrum-based services, Congress *required* that the Commission consider the use of installment plans in its arsenal of bidding preferences to assist small business and other designated entities.⁴ Previous successful auctions have proven that allowing installment payments for designated entities has achieved the objective for which they were established: to increase the participation of designated entities in spectrum auctions.⁵ In its recent *Competitive Bidding Order and Notice of Proposed Rulemaking*, the Commission again recognized the important role that installment payment plans have played in connection with small business access to capital and their participation in spectrum auctions.⁶

² 47 U.S.C. § 309(j)(3)(B), (4)(D).

³ See, e.g., *Report and Order*, Amendment of Parts 20 and 24 of the Commission's Rules-Broadband PCS Competitive Bidding and the Commercial Mobile Radio Services Spectrum Cap, 11 FCC Rcd 7824, 7846 (1996).

⁴ *Id.*, § 309(j)(4)(A), (D).

⁵ *Report*, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, ¶ 43 (rel. May 8, 1997) ("Market Barriers Report") (noting that installment payments among measures taken by Commission to "enhance access to capital for small business in the auction process" and observing that "[u]pcoming auctions such as the LMDS auction also will offer small business installment payments").

⁶ *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, Amendment of Part 1 of the Commission's Rules – Competitive Bidding Proceeding, WT Docket No. 97-82, ¶ 34 (rel. Feb. 28, 1997) (installment payment plans, coupled with bidding credits "have resulted in new opportunities for small businesses to offer spectrum-based services" and are "useful tool for small business to access capital"); see also *Market Barriers Report*, ¶ 149 (tiered installment payment plans among the special incentives Commission continues to adopt "to encourage the participation of small businesses in auctions").

- ***Elimination of installment payments will resurrect substantial capital access barriers to small business participation in LMDS.***

Cook Inlet is unique among designated entities in that it has been granted exemptions from Commission affiliation rules (including for the LMDS auctions) under various statutory provisions and administrative determinations.⁷ These exceptions provide it with vast access to capital that would disqualify other entities from the small business designated entity category.⁸ This clearly distinguishes Cook Inlet from other designated entities eligible for bidding credits. For this reason Cook Inlet is hardly representative of typical small or very small business designated entities and its proposal cannot be viewed as such.

Most fundamentally, Cook Inlet's proposal ignores the importance of installment payment plans to small businesses *access* to capital, instead focusing on how *cost* of capital differences between large and small companies, even with the elimination of installment payments, may be remedied through larger bid discounts alone.⁹ While its proposal, if adopted, would not adversely affect its own interests, Cook Inlet's proposal would be devastating for typical designated entities, for whom *access* to capital, not just its *cost* (as the Commission has found over and over again), is the key barrier to participating in Commission auctions.

As Cook Inlet has pointed out, unlike commercial lending, the Commission's installment payment program is offered to all qualifying designated entities, with no pre-qualification by the Commission as to "credit-worthiness." Cook Inlet, however, has missed the essential point: the difficulty true small businesses face of being deemed "credit-worthy" by traditional commercial lenders is *exactly* the issue the installment program was designed to address. Unlike cost of capital issues, which are purely *quantitative*, access to capital issues for small businesses are derived in no small part from commercial lending practices, which are driven by *qualitative factors informed by subjective judgments*.

The reality is that commercial lenders may be unwilling to pre-commit funds to what is, in essence, a highly contingent endeavor created of necessity by the government, i.e., an auction. In the absence of an installment payment program, or some comparable form of guaranteed Government financing, a small business likely will have little or no ability to procure commercial debt financing prior to the auction for the balance due the U.S. Treasury, regardless of the level of discount. Therefore, small and very small businesses will be forced to participate in the auction with equity alone. In most instances, this capital structure will be insufficient, since nearly all of this equity would be paid to the government up-front, before buildout can occur, even though revenue, which can be used to repay the cost of the long-term asset, is generated

⁷ See *Order on Reconsideration* in CC Docket No. 92-297 ¶¶ 8-10 (rel. May 16, 1997).

⁸ *Id.*

⁹ Cook Inlet Petition at 10-11.

over a 10-year period. This is in stark contrast to larger bidders (including, presumably, Cook Inlet), who have existing lines of credit, can float commercial paper, or readily qualify for and obtain bridge funding.

In the absence of term payments, the capital access picture for small businesses would be further complicated by the Commission's designated entity control rules. Since lenders will not generally support debt financing for licensing, small businesses will be forced to also raise new, additional equity while being required to maintain compliance with the Commission's Rules on de facto and de jure control.

Overall, these very formidable access to capital hurdles faced by small and very small businesses have been thoroughly explored by the Commission throughout the history of the designated entity program. These barriers necessitated the implementation of the existing installment payments program and demonstrate the need for its continued existence.

- ***Perceived problems in the C block auction do not justify the wholesale elimination of installment payments for LMDS designated entities.***

WebCel recognizes the probable catalyst for Cook Inlet's proposal—attempts by certain C block winners who overbid to lobby the Commission for forgiveness or restructuring of their debt obligations to the Government. Although the C block problems constitute today's frustration, we do not believe that legitimate concerns about the C block auction logically lead to the draconian policy conclusion that installment payment support for designated entities should be eliminated for future auctions, such as LMDS.

The Commission should neither lose heart nor its commitment to small and very small businesses based on its experience with the C block auction. Irresponsible and speculative bidding, unrealistic business cases, and a segregated designated entity auction design (which excluded larger bidders from the auction room), all coalesced in the C block auction. Given the increased attention of the money markets to bidding conduct and governance since the C block auction, the tightness of capital generally for spectrum auctions, and the fact that LMDS auctions will not be limited to designated entities, the potential for repeat of the C block experience seems remote, at best.

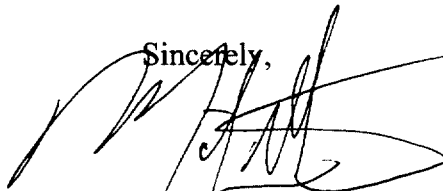
The Commission must not withdraw a *clearly effective policy initiative* in response to the first-time events of the C block auction. To do so would effectively exclude start-up firms and true entrepreneurs from the LMDS service, thereby "throwing out the baby with the bathwater." This would be contrary to the Congressional mandate underlying the Commission's competitive bidding authority and the Commission's own policy. Political expediency or administrative frustrations associated with the first-time events of the C block auction do not, in our view, provide the very substantial justification required by the Administrative Procedures Act and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Ins. Co.*¹⁰ to support such a radical departure from the Commission's settled policy in this area.

CONCLUSION

WebCel believes that the Commission (with the addition of a very small business category as urged by WebCel in its Petition for Reconsideration) has already crafted appropriate and well-balanced rules, providing opportunities for success to designated entities, as well as measured and equitable penalties for misjudgment. Some form of an installment payment program is an important component of these rules for the continued success of the designated entity program.

Rather than adopt Cook Inlet's proposal, WebCel urges the Commission to enforce its existing rules in a clear, consistent and expeditious manner. At the same time, the Commission should maintain the common, established commercial practice, currently unavailable to true designated entities in the marketplace, of financing the acquisition of long-term assets via a government-supported term payment program. The simple action of holding steadfast to clearly articulated guidelines for those auction winners who irrationally bid, would greatly mitigate the possibility of over-exuberance of the part of future auction participants and, together with term payments, would continue to provide the opportunity for success to responsible designated entity participants.

Sincerely,



Martin L. Stern

Counsel for WebCel Communications, Inc.

cc: John Cimko, Kathleen O'Brien Ham, Nancy Boocker, Sande Taxali, Diane Conley, Mark Bollenger, Matthew Moses, Joe Levin, Linda Haller

Joe D. Edge, Mark F. Dever, *Counsel for Cook Inlet Region, Inc.*
Michael R. Gardner, *Counsel for CellularVision U.S.A., Inc.*

¹⁰ 463 U.S. 29 (1983).